

November 26, 2003

Ms. Jean Close
Division of Integrated Health Systems-Mail Stop S2-14-26
Disabled & Elderly Health Program Group
Center for Medicaid and State Operations
Centers for Medicare & Medicaid Services
7500 Security Blvd.
Baltimore, MD 21244-1850

Dear Ms. Close:

Attached please find responses from the Division of Medical Assistance to questions put forth by the Centers for Medicare and Medicaid Services regarding Massachusetts's proposed Transfer of Assets Demonstration. I hope these responses will facilitate your review of our waiver proposal. If you have any questions about these responses, please do not hesitate to call Stephanie Anthony, Director of Federal and National Policy Management, at 617-210-5435.

On a related note, on November 7, 2003, members of the Massachusetts Congressional Delegation sent a letter to Thomas Scully expressing concerns about certain provisions of the Commonwealth's Transfer of Assets Demonstration proposal. Several of the concerns described in the letter are based on incorrect interpretations of the provisions. As such, the Division will be sending you a separate letter responding to these concerns and clarifying the intent of the provisions in question.

Sincerely,

Beth Waldman
Medicaid Director

MASSACHUSETTS 1115 DEMONSTRATION
AFFECTING ASSETS OF INSTITUTIONALIZED INDIVIDUALS

Questions Regarding Massachusetts' Transfer of Assets Demonstration

GENERAL

1. We would like to have more discussion of the State's plan to implement the demonstration especially as it pertains to transfers that predate the effective date of the demonstration. Would the new rules governing the start date of the penalty period and the look-back period be applied retrospectively to transfers that occurred prior to the effective date? We are concerned about retroactive enforcement against Seniors who transferred their assets under different Federal Rules. Also, the Commonwealth proposes to increase the look-back period for transfers into irrevocable trusts from 60 to 120 months for all applicants after the demonstration is implemented. If the state is intending retrospective enforcement and in consideration of the long period of time of the look-back period would the state consider a phase-in of the extension of the look-back period that would begin after the effective date of the demonstration? Also, CMS is still considering the justification for lengthening the look-back period.

The Commonwealth's proposal would apply to all applications filed with the Division on or after the effective date of the new rules. These new rules, thus, would affect transfers that occurred prior to the effective date of the new rules and also trusts created prior to the effective date of the new rules.

The Commonwealth notes that federal laws have been enacted with similar effect on transfers that occurred prior to the enactment of those laws and to trusts created prior to such enactment. The federal statute that originally placed transfer of asset provisions in federal law, Section 132 of the Tax Equity and Fiscal Responsibility Act of 1982 (Pub.L. 97-248), applied in part to transfers that had previously occurred. The effective date provision, subsection (d) of Section 132, applied to all transfers under paragraphs (c)(1) and (c)(2)(A) of the Act that had occurred prior to the effective date of the act, subject only to the limitation of the look-back period. (Another paragraph, (c)(2)(B), applied only to transfers occurring on or after the date of the Act's enactment.) Thus, parts of this federal law did apply to transfers that occurred prior to the effective date of the Act, and applied to transfers that had been made when the federal law imposed no transfer penalties.

Similarly, the federal statute that originally placed the "Medicaid qualifying trust" provisions in federal law, Section 9506 of the Consolidated Omnibus Budget Reconciliation Act of 1985," applied to "medical assistance furnished on or after the first day of the second month beginning after the date of the enactment of this Act." Thus, this Act made it possible to count the assets of trusts created before the enactment of the Act, with no "look-back" limitation or other time limitation on the age of the trust.

There is federal precedent, therefore, for the state's request to apply the new rules to all applications for Medicaid filed on or after the date of enactment of the new rules. In light of this federal precedent, the Commonwealth has not considered phasing-in the extension of the look-back period.

We also note that the state's proposal has been widely publicized both in Massachusetts and nationally, so that estate planners already have advance notice of the possible implementation of the new rules under the demonstration project.

As for the rationale for lengthening the look-back period, please refer to our response to Question 9.

FUNDING QUESTIONS

Response to Questions 2-6

The changes the Commonwealth is proposing to make to its current asset transfer rules affect only eligibility for MassHealth institutional long-term care benefits, and would not affect current payment methodologies or financing mechanisms for our nursing facility providers.

2. Section 1903(a)(1) provides that Federal matching funds are only available for expenditures made by states for services under the approved State Plan. To ensure that program dollars are used only to pay for Medicaid services, we are asking the State to confirm to CMS that providers in the Assets Affecting Institutionalized Individuals 1115 Demonstration (the Demonstration) would retain 100 percent of the payments. Would the State, through the Demonstration, participate in activities such as intergovernmental transfers or certified public expenditure payments, including the Federal and State share; or, would any portion of any payment be returned to the State, local governmental entity, or any other intermediary organization? If the Demonstration would be required to return any portion of any payment, please provide a full description of the repayment process. Include in your response a full description of the methodology for the return of any of the payments, a complete listing of the amount or percentage of payments that are returned and the disposition and use of the funds once they are returned to the State (i.e., general fund, medical services account, etc.)

Not applicable. See above statement.

3. Section 1902(a)(2) provides that the lack of adequate funds from local sources will not result in lowering the amount, duration, scope, or quality of care and services available under the plan. Please describe how the State's share of the Medicaid payment for the Demonstration would be funded. Please describe whether the State's share would be from appropriations from the legislature, through intergovernmental transfer agreements (IGTs), certified public expenditures (CPEs), provider taxes, or any other mechanism used by the State to provide State share. Please provide an estimate of total expenditures and State share amounts for the Medicaid payment. If any of the State share would be provided through the use of local funds using IGTs or CPEs, please fully describe the matching arrangement. If CPEs are used, please describe how the state verifies that the expenditures being certified are eligible for Federal matching funds in accordance with 42 CFR 433.51(b).

Not applicable. See above statement.

4. Section 1902(a)(30) requires that payments for services be consistent with efficiency, economy, and quality of care. Section 1903(a)(1) provides for Federal financial participation to States for expenditures for services under an approved State plan. If supplemental or enhanced payments would be made, please provide the total amount for each type of supplemental or enhanced payment made to the Demonstration.

Not applicable. See above statement.

5. This is applicable to inpatient hospital, outpatient hospital and clinic services. Please provide a detailed description of the methodology to be used by the state under the demonstration program to estimate the upper payment limit for each class of providers (State owned or operated, non-state government owned or operated, and privately owned or operated).

Not applicable. See above statement.

6. Would any public provider receive payments (normal per diem, DRG, fee schedule, global, supplemental, enhanced, other) that in the aggregate exceed its reasonable costs of providing services? If payments exceed the cost of services, does the State recoup the excess and return the Federal share of the excess to CMS on the quarterly expenditure report?

Not applicable. See above statement.

INDIVIDUALS TO WHOM THE DEMONSTRATION WOULD APPLY

7. Has the Commonwealth considered whether the Transfer of Assets initiative would increase the demand for Home and Community-Based Services (HCBS)? What provisions has the Commonwealth considered for accommodating any increased demand? The application states that the demonstration would not affect individuals in community settings or individuals currently receiving benefits under the existing demonstration. If an applicant asks for HCBS as an alternative to institutional care, does the State have slots available to accommodate these individuals?

The Division currently allows up to 8,000 individuals in its HCBS waiver for frail elders over age 60. There currently are about 5,000 people enrolled in the waiver program. The Division does not anticipate a problem with enrollment in this waiver program if the Asset Transfer waiver is approved, as the HCBS waiver program is not actually capped and there is flexibility to increase the number of individuals who can enroll in the program if necessary.

8. While the demonstration will affect nursing facility applicants, would the demonstration affect individual applicants for ICF-MR or other long-term institutional services? How would the demonstration affect individuals in community settings (receiving Medicaid) who need to transfer to an institution?

The demonstration would affect all individuals applying for long term care services, including ICF-MRs and other long-term institutional settings, under the Divisions traditional regulations. For individuals who are on MassHealth in a community setting who need to enter a nursing facility, the process would remain as it is today. The individual would have to complete the long-term care supplement of the Senior application, which asks about assets and any transfers of assets that the individual would have made in the previous 36 months. Although the individual may be eligible for MassHealth in the community, this specific area of eligibility has different requirements that have to be met. If there were a transfer of assets that renders the individual ineligible for long-term care services, the individual would remain eligible for MassHealth in a community based setting.

LOOK-BACK PERIOD

9. Why does the State believe that the current look-back periods are inadequate? The request to extend the look-back period for irrevocable trusts from 5 years to 10 years seems especially far-reaching.

The Division often sees irrevocable trusts that were set up prior to the five-year look-back period. For example, in June 2003, the Division received an application where an irrevocable trust was established in October 1996, nearly 7 years prior to the date of application. The trust placed the applicant's and spouse's home in the trust, and the trust gave the home to their son upon the applicant's death. Under the current rules governing trusts and estate recovery, the value of the home in this trust is not countable and the home avoids estate recovery. Since the trust was established beyond the five-year look-back period, no transfer penalty can be imposed.

In another application received July 16, 2003, the applicant placed her funds in an irrevocable trust established on December 21, 1994, nearly eight and one-half years prior to the date of application. Those funds are currently valued at over \$87,000. Upon the applicant's death, the funds go to a named charitable organization. Under the current rules governing trusts and estate recovery, the funds are not countable and they avoid estate recovery. Since the trust was established beyond the five-year look-back period, no transfer penalty can be imposed.

These are two examples of successful estate planning that added to the state and federal governments' Medicaid costs that cannot be recovered, when these costs would have been significantly reduced with a ten-year look-back period for irrevocable trusts.

TREATMENT OF CERTAIN ASSETS

10. What recourse does an individual have if he or she challenges some aspect of the State's review of the application? For example, assume that an applicant argues that a home improvement which the State deemed a transfer of asset at less than fair market value is indeed a necessary home maintenance cost. Can the applicant appeal the State's decision--if yes, please describe the appeals process.

Yes. An individual applying for MassHealth always has the right to appeal any decision made by the Division to the Board of Hearings. This is a group of hearings officers who work independent from the MassHealth Enrollment Centers, where the decisions on eligibility are made. The Hearings Officer will hear the facts of the case and listen to testimony from both parties and then make an impartial determination based upon governing regulations. In many instances, the Hearing Officer has greater discretionary powers than the eligibility worker. For more information about the Division's appeals process, please see 130 C.M.R. 610. (See: http://www.state.ma.us/dma/masshealthinfo/regulations_eligibility/regs_memb_610.pdf.)

11. At several points, Massachusetts suggests that the spousal protections of Section 1924 would continue to apply. However, section 5.2 of the proposal specifically changes the rules that apply only in a spousal impoverishment context. Please explain.

The changes presented in Section 5.2 of the proposal apply to the applicant's expenditure of excess assets whether or not the applicant has a spouse. There are no waivers required of Section 1924, and all protections provided by Section 1924 will continue to be implemented.

12. Does the State have the legal authority to restrict what an individual may and may not spend their assets on? How does one define "necessary living expenses"? Would the

restriction against home improvements deter individuals from making home improvements that may allow them to stay in the community?

Under Section 1917(c)(1)(A), the State does not currently have the legal authority to restrict what individuals may and may not spend their assets on. That is because Section 1917(c) only penalizes transfers for less than fair market value. If an applicant spends \$30,000 on a wedding for her daughter, and paid fair market value for the wedding, then, under Section 1917(c), no transfer of asset penalty can be imposed. A Medicaid applicant actually made such an expenditure just prior to applying for benefits. Under the proposed demonstration project, the applicable provision of Section 1917(c) would be waived so that the State could implement the changes proposed in Section 5.2 of the proposal. Under recently enacted state law (Section 317 of the FY 2004 General Appropriations Act), the State is authorized to require that excess assets be spent on health care or other necessary living expenses.

The State would have to define “necessary living expenses” in a reasonable manner in its regulations. The definition would rely on the model for such expenses under the provisions in Section 1924 used for determining the minimum monthly maintenance needs allowance, including the extraordinary expenses allowed under Section 1924.

Since the new rules proposed under the demonstration project would only apply to those who are institutionalized, there would be no expenditures to make home improvements so that the person could stay in the community, because the person will not be in the community. However, if home improvements could be made that would allow the institutionalized person to return to the community, or allow an ailing community spouse to stay in the community, then the State would allow such expenditures as necessary living expenses.

BUDGET NEUTRALITY

13. Is the four-month average penalty period assumed in the budget neutrality projections an assumption or based on experience? Please describe how the \$33,000 transfer amount estimate was determined for calculating the penalty period.

The four-month penalty period is based on the assumption that members who do make inappropriate transfers will transfer, on average, \$33,000. At the time the waiver application was submitted, MassHealth penalized members by one day for every \$214 in inappropriate transfers. This would cause a penalty period of approximately 154 days, allowing the individual eligibility after five months. Because some members would have transferred less than the average and actually be deferred for less than five months, we erred on the side of being more conservative than necessary and assumed a delay of only four months.

The \$33,000 transfer is a very rough estimate, loosely derived from data in Connecticut’s recent application for a similar waiver. The Commonwealth does not currently have accurate data on the number of improper transfers that may occur. We also do not currently know how the waiver itself may affect behavior. However, the Division is in the process of collecting data on the types and amounts of transfers made, the transferee, and the period of ineligibility associated with improper transfers to help estimate the impact of the waiver on behavior.

14. Please describe any information on the number of caseload months the Commonwealth has diverted under the current rules for transfer of assets.

Historically, the Commonwealth has not tracked the number of months the Commonwealth has diverted under the current rules for transfer of assets. While the Commonwealth has recently

begun to collect this information, we do not have sufficient data to draw any conclusions at this point.

15. The application states that the demonstration will not have significant additional administrative costs. Wouldn't there be more administrative burden on State staff to implement the proposed changes—for example, new duties would include tracking down sequential transfers, assessing the value of non-countable assets, determining what portion of an equity loan should be treated as a transfer of asset of less than fair market value. Wouldn't these new activities have costs?

We expect the activities associated with the waiver to cause minimal additional work to the staff members who are responsible for collecting and reviewing asset related information. Because asset reviews are done currently, this would be an incremental addition. That said, it is conceivable that staff may not be able to absorb every additional task, and that the Division would need to higher additional staff. At most, we estimate this would cost \$100,00 per year.

OUTREACH/EDUCATION

16. Public outreach and education will be important step in discouraging individuals from making transfers of assets to qualify for Medicaid payment of long-term care services, a stated objective of the demonstration. How will the Commonwealth implement public education and outreach activities? Please describe any efforts is the Commonwealth is making to encourage and assist retirees and pre-retirees to plan ahead for long-term care financing without relying on Medicaid.

Pre-implementation

To date, the asset transfer waiver proposal already has been widely publicized. Since early 2003, when the proposal was announced as part of Governor Romney's FY 2004 budget proposal, there have been several legislative hearings at which the asset transfer waiver proposal was discussed and the public was invited to attend. On these occasions, members of the public, including estate planning attorneys and seniors provided comments and questions to the legislative committees about the asset transfer proposal. In addition, there has been significant press coverage of the hearings and the FY 2004 state budget, in which the Massachusetts Legislature authorized the Division to seek the transfer of assets waiver effective July 1, 2003.

During implementation

If the demonstration project is approved, the Commonwealth will implement the project only after regulations have been published in the *Massachusetts Register* and after a three-week public notice and public comment period, as provided by Massachusetts General Laws, Chapter 30A. Public notice will include publication in newspapers. The period of public comment must be at least 21 days prior to the adoption of the regulations. (See Section 1.3 above for discussion on the effective date.)

The notices in newspapers and the *Massachusetts Register*, along with notices that go to those who place themselves on a list to receive such notices, will reach relevant advocacy groups, nursing homes, estate planners, and trade associations. One estate planning law firm which has a national mailing list, Margolis and Associates of Boston, has already distributed one of its publications, "Massachusetts Update" (Spring 2003), which describes the proposed transfer penalty start date contained in this Demonstration Project proposal and discussed the legislation, described above, which subsequently was enacted into law. Thus, this proposed Demonstration Project has already received significant publicity and is known to affected groups.

EVALUATION

17. CMS would like to further discuss the evaluation aspects of the demonstration.

Specifically, we are interested in determining the demonstration's hypotheses, the data to be collected, and how the evaluation would be implemented.

As noted in our waiver proposal, the Commonwealth plans to evaluate the success of this Demonstration Project by devising ways to measure outcomes to test the following hypotheses:

1. Fewer instances of voluntary impoverishment to obtain Medicaid payment of nursing home care will occur.
2. The method of spending down excess assets will change in a way that increases an individual's expenditures for essential expenses, including medical care, and decreases their expenditures for nonessential items.
3. Federal and state medical assistance expenditures for institutionalized long-term care will grow at a slower rate.
4. Tightening asset transfer policies will encourage the purchase of long-term care insurance policies.

To be able to measure and test the above hypotheses, the Division of Medical Assistance is currently gathering data on transfers of assets and spend-down behavior to serve as a baseline. Some of the data the Division is collecting and tracking is the type of transfers made, the amount of the transfers, the person to whom the property or money is transferred, and the period of ineligibility associated with the transfer. Over time, this data will help us confirm or disprove the hypotheses. If they are confirmed, they will provide a basis for changing federal law to incorporate the rules of this Demonstration Project.